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In the Supreme Court of the United States

OCTOBER TERM, 1984

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent devotes the major portion of its brief (Br. 21-41) to the proposition that the Title I school attendance area eligibility standards in effect from 1967 through 1976, 45 C.F.R. 116.17(d) (1972), were "out of harmony" (Br. 34-35) with the goals of the Title I program and "of dubious legal validity" (Br. 35). Does respondent, then, urge this Court to declare that those regulations were invalid? It does not and cannot.

As respondent itself points out (Br. 15-17 nn. 12 & 13), if the court of appeals had agreed with its argument that the regulations governing this case were invalid, then respondent would have been absolved of all liability. Under the judgment below, however, respondent concedes it is liable to repay at least $249,607 in misspent funds (*ibid.*). Respondent did not file a cross-petition for a writ of certiorari, and thus is not free in this Court to argue that the 1967-1976 regulations were invalid; such an argument

would provide respondent greater relief than did the decision below. *Strunk* v. *United States*, 412 U.S. 434, 435-437 (1973); *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972).[1]

For purposes of this case, therefore, the Court must assume that the regulations respondent violated were valid and enforceable. Respondent's criticisms of the regulations are simply irrelevant to the actual issue in the case, which is whether statutory changes in subsequent Title I grants should be held to apply retroactively to grants made and administered under the prior, valid, standards. When respondent finally turns to that issue (Br. 41-49), it offers nothing to cast doubt upon the correctness of the analysis presented in our opening brief.

2. Respondent contends (Br. 47 n.20) that the general savings statute, 1 U.S.C. 109, does not apply to liabilities incurred under subsequently repealed or amended regulations, as opposed to statutes. This contention is unfounded. The plain language of the savings statute indicates that it applies to any liabilities "incurred *under* such statute" (emphasis added); this extends to any liabilities incurred pursuant to the authority of the statute. *De La Rama Steamship Co.* v. *United States*, 344 U.S. 386 (1953). Indeed, this Court has expressly stated:

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[1]Nor do respondent's arguments on this score have any merit. The congressional intention that Title I funds be used in "areas which have the highest proportions of children from low-income families" (S. Rep. 95-856, 95th Cong., 2d Sess. 7 (1978); H.R. Rep. 95-1137, 95th Cong., 2d Sess. 5 (1978)) is obviously served by a rule requiring that school districts confine Title I programs to areas where the concentration levels are at or above the average for the district as a whole. Our opening brief (at 27-32) contains an extended discussion of the point. Whether one agrees with this rule as a matter of policy, it is plainly neither arbitrary nor irrational. See 20 U.S.C. (1976 ed.) 241e(a), 242(b) (explicit delegation of rulemaking authority to grantmaking agency); *Chevron U.S.A., Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5-6; *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981).

> The precise object of the general savings statute is to prevent the expiration of a temporary statute from cutting off appropriate measures to enforce the expired statute in relation to violations of it, *or of regulations issued under it*, occurring before its expiration.

Allen v. *Grand Central Aircraft Co.*, 347 U.S. 535, 554-555 (1954) (emphasis added).[2]

The Court has not hesitated to apply the general savings clause to preserve liabilities incurred under regulations issued pursuant to statutes that subsequently expired or were repealed. See *United States* v. *Palletz*, 330 U.S. 812 (1947) (summarily reversing, on authority (inter alia) of general savings clause, then Rev. Stat. § 13 (1878 ed.), judgments dismissing prosecutions for violations of regulations issued under Emergency Price Control Act of 1942, after expiration thereof); *United States* v. *Wheelbarger*, 331 U.S. 791 (1947) (same).

Respondent's reliance on *Rodgers* v. *United States*, 158 F.2d 835 (6th Cir.), rev'd in part on other grounds, 332 U.S. 371 (1947), and *United States* v. *Hark*, 49 F. Supp. 95 (D. Mass. 1943), rev'd, 320 U.S. 531 (1944), is rather surprising. In *Hark*, this Court squarely held "that revocation of [a] regulation did not prevent indictment and conviction for violation of its provisions at a time when it remained in force" (320 U.S. at 536). This is because the common law rule barring criminal prosecutions for offenses subsequently repealed does not apply to changes in regulations. "Revocation of the regulation does not repeal the statute; and though the regulation calls the statutory penalties into play,

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[2]Although the Court's statement in *Allen* refers directly to the second sentence of 1 U.S.C. 109 (concerning the expiration of temporary statutes), it applies with equal force to the first sentence of the Section (dealing with repealed statutes). The two sentences are in every other respect identical.

the statute, not the regulation, creates the offense and imposes punishment for its violation" (*ibid.* (footnote omitted)). *Rodgers* is to similar effect. Thus, if the general savings statute does not apply to changes in regulations, it is because a savings clause is unnecessary — not because a contrary result is intended.

It therefore does not matter whether this case is viewed as involving a regulatory change (due to the 1976 regulatory revision) or a statutory change (due to the 1978 Act). In either case, liabilities incurred under the regulations, valid at the time, are not released or extinguished by subsequent developments.

3. Respondent's final contention is that the court of appeals in this case "did what courts of equity historically do" (Br. 20); that, "[g]iven its imperative to justly resolve disputes presented to it, in equity, it could do no less" (Br. 49). However, the role of the courts in judicial review of the Secretary's determinations under the Act is to judge whether the Secretary has acted in compliance with law. Cf. *Fedorenko* v. *United States*, 449 U.S. 490, 516-517 (1981). The role for equity and forgiveness in this scheme is played by Congress and the Secretary, not by the courts. Congress expressly considered whether to forgive liabilities for Title I funds misspent prior to 1978 — including New Jersey's — and rejected the proposal. See 127 Cong. Rec. S5430 (daily ed. May 21, 1981). Upon completion of this litigation, the Secretary will have authority, subject to statutory standards, to return up to 75% of the recovery to the State. See Pet. Br. 48-49. The court of appeals erred in relieving respondent of its obligation to repay funds misspent under regulations in effect at the time, merely because Congress

and the agency subsequently decided to change program requirements in later years.[3]

For these reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1984

[3]We call the Court's attention to an additional authority supporting our position that subsequent changes in federal grant provisions should not be applied to grants made and administered under prior law. *National Wildlife Federation* v. *Marsh*, 747 F.2d 616 (11th Cir. 1984).

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